rule sought by petitioners and the Government – that price fixing by a joint venture requires no procompetitive justification – would create a sea change in Sherman Act Section 1 jurisprudence, establish a roadmap for price fixing, and undercut both private and public antitrust enforcement.[9]

On the other hand, if certiorari is denied, this case returns to the district court for trial and the development of a complete record, where, in accordance with more than a century of settled antitrust law, Shell and Texaco will have a full opportunity to show how their price fixing was integral or reasonably related to the claimed efficiencies or procompetitive aspects of their joint ventures (although the jury will of course be free to consider the disavowal of any such connection by all of their executives who have testified on the question).

---

rates were set jointly. Second was profit pooling. All profits realized were pooled and distributed to the Star and the Citizen by TNI pursuant to an agreed ratio. Third was a market control. It was agreed that neither the Star nor the Citizen nor any of their stockholders, officers, and executives would engage in any other business in Pima County – the metropolitan areas of Tucson – in conflict with the agreement. Thus competing publishing operations were foreclosed.

394 U.S. at 134. This Court found the claimed Section 1 violations to be "plain beyond peradventure." 394 U.S. at 135-36. The Government argues that *Citizen Publishing* is distinguishable because the "agreement fixed prices and pooled profits for defendants' separately owned and produced news and editorial content." (United States brief, p. 13, n.12.) To the contrary, as this Court expressly stated, "Commercial advertising placed in the papers was sold only by the advertising department of" their joint venture, and "advertising rates were set jointly." 394 U.S. at 134. The Government is thus plainly wrong that *Citizen Publishing* is factually distinguishable. As the court of appeals correctly found, *Citizen Publishing* squarely applies and dictates the result in this case.

[9] The Government's position in this case, if adopted, could leave consumers without an antitrust remedy if the next oil company joint venture approved by the Government consists of three, four, or more major oil companies, who then decide to charge the same price for all their brands.

Dated: June 8, 2005

Respectfully submitted,

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CASE NO. CV-99-06114 GHK (JWJx)

FOUAD N. DAGHER, et al.,
Plaintiffs,

-vs-

SAUDI REFINING, INC., et al.,
Defendants.

DEPOSITION UPON ORAL EXAMINATION OF PETER BIJUR

TRANSCRIPT of the videotaped deposition of PETER BIJUR, called for Oral Examination in the above-entitled matter, said deposition being taken by and before LINDA BAYLES, a Certified Shorthand Reporter of the State of New Jersey, at the offices of CADWALADER, WICKERSHAM & TAFT, 350 Park Avenue, New York, New York, on May 31, 2001, commencing at 9:35 a.m.

* * *

[78] Q Did you discuss with Mr. Jum'ah or Mr. Carroll or Mr. Herkstrotter what the pricing would be under the alliance?

A Never.

Q Did the pricing have anything to do with the cost savings?

A No.

* * *

[81] A I just don't know. I don't know how to answer that question.

Let me say something here with respect to this because I think this is important.

All the synergies, all of the cost savings and the figures which we calculated had nothing to do with pricing, nothing.

* * *

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

. X

FOUAD DAGHER, et al,

Plaintiff,

-against-

CV-99-6114-GHK (MANx)

SAUDI REFINING, INC.,

Defendant.

. X

HELD AT: Texaco, Inc.
2000 Westchester Avenue
White Plains, New York
January 11, 2000 9:45 a.m.

Examination Before Trial of the Defendant, GLENN T. TILTON ON BEHALF OF TEXACO, INC., held pursuant to Agreement, at the above time and place, before a Notary Public of the State of New York.

* * *

[93] Q. And then the next page is, synergy opportunities by operations.

A. Correct.

Q. And it shows where the expected synergies are supposed to come from, right?

A. Correct. Correct.

Q. And if you look at the next page, the total of the synergies is expected to be about eight hundred million dollars.

A. That's correct.

Q. Okay. Are you aware of any cost savings or synergies that were anticipated as a result of charging the same prices for the brands in the same markets?

A. No.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

DAGHER, ET AL	)	
	)	CASE NO.
vs.	)	CV99-06114 GHK
SAUDI REFINING, INC., ET AL	)	

ORAL VIDEOTAPED DEPOSITION
JOHN DARNLEY
February 16, 2001

ORAL VIDEOTAPED DEPOSITION OF JOHN DARNLEY, produced as a witness at the instance of the Plaintiffs and duly sworn, was taken in the above-styled and numbered cause on the 16th day of February, 2001, from 9:02 a.m. to 3:11 p.m., before Vickie G. Hildebrandt, Certified Shorthand Reporter in and for the State of Texas, reported by computerized stenotype machine at the offices of Equilon Services, L.L.C., 12700 Northborough Drive, Houston, Texas, pursuant to the Federal Rules of Civil Procedure and the provisions stated on the record or attached hereto.

* * *

[41] Q. Okay. Before you assumed your position, were you aware that work had been done by what's called the synergy team to analyze potential cost savings from the – if the alliance were formed?

A. I had heard and cannot remember any specific detail that there were – clearly one of the goals was to – to obtain cost savings from the creation of the alliance.

Q. Okay. And did you – did you learn that the – the parties believed there were potentially $800 million of cost savings to be realized from the formation of the alliance?

A. I heard that mentioned at a meeting, a large meeting with people and a number was – seems to approximate to that was mentioned.

Q. Okay. Now, are you aware of any potential cost savings that were anticipated from charging the same price for the Shell and Texaco brands in the – in the same markets?

A. No.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

DAGHER, ET AL	)	
	)	CASE NO.
vs.	)	CV99-06114 GHK
SAUDI REFINING, INC., ET AL	)	

ORAL VIDEOTAPED DEPOSITION

LARRY BURCH

February 20, 2001

ORAL VIDEOTAPED DEPOSITION OF LARRY BURCH, produced as a witness at the instance of the Plaintiffs and duly sworn, was taken in the above-styled and numbered cause on the 20th day of February, 2001, from 10:09 a.m. to 4:21 p.m., before Vickie G. Hildebrandt, Certified Shorthand Reporter in and for the State of Texas, reported by computerized stenotype machine at the offices of Baker & Hostetler, L.L.P., 1000 Louisiana, Suite 2000, Houston, Texas, pursuant to the Federal Rules of Civil Procedure and the provisions stated on the record or attached hereto.

* * *

[42] Q. Right.

Okay. Let me show you what's marked as Exhibit 177. 177 – before I do that, there's something else I want to ask you.

When you – at the time you – just before you became the vice president of Motiva, after you learned you were

going to be, were you advised or did you become aware that one of the reasons for the [43] formation of the alliance was anticipated synergies or cost savings that would result from the alliance?

A. Yes.

Q. And did you hear the number $800 million?

A. Yes.

Q. Okay. Now – and you mentioned that after the alliance was formed – after Motiva was formed, you implemented this policy of charging the same price for the Shell and Texaco brands in the same area?

A. Yes.

Q. Okay. Was there any cost savings or synergy that resulted from doing that?

A. No.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

DAGHER, ET AL	)	
	)	CASE NO.
vs.	)	CV99-06114 GHK
SAUDI REFINING, INC., ET AL	)	

ORAL VIDEOTAPED DEPOSITION
MARK WILLIAMS
January 19, 2001

ORAL VIDEOTAPED DEPOSITION OF MARK WILLIAMS, produced as a witness at the instance of the Plaintiffs and duly sworn, was taken in the above-styled and numbered cause on the 19th day of January, 2001, from 9:01 a.m. to 3:46 p.m., before Vickie G. Hildebrandt, Certified Shorthand Reporter in and for the State of Texas, reported by computerized stenotype machine at the offices of Fulbright & Jaworski, L.L.P., 1301 McKinney, 45th Floor, Houston, Texas, pursuant to the Federal Rules of Civil Procedure and the provisions stated on the record or attached hereto.

* * *

[26] Q. You also – in your speech, you said the synergy team, quote, "found astonishing synergies," end of quote. What did you mean by "synergies"?

A. Synergies were largely opportunities to – to reduce costs by putting the merger together or in some cases to – to increase revenue or to – to – to use our assets, dispose of redundant assets, for example, but most of the synergies were – were related to costs and efficiencies and they were simply done by, you know, an analysis of – of

how business was done in the – the existing companies and how might it be done differently in a merged company.

Q. Now, was there any discussion that any cost savings would result from charging the same price for the Shell and Texaco brands?

A. No. The synergy team got – never got into pricing.

Q. Are you aware of any cost savings that have resulted from charging the same prices for Shell and Texaco brands?

A. I couldn't say.

* * *

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FOUAD DAGHER, et al.	)	
	)	CV-99-6114-GHK (MANx)
vs.	)	
SAUDI REFINING, INC., et al.	)	

****

CONFIDENTIAL VIDEOTAPED DEPOSITION OF
LOUIS WILSON BERRY, JR.
December 8, 2000

****

VIDEOTAPED DEPOSITION OF LOUIS WILSON BERRY, JR., produced as a witness at the instance of the Plaintiff, and duly sworn, was taken in the above-styled and numbered cause on the 8th day of December, 2000, from 9:26 a.m. to 4:55 p.m., before Lori O'Koren, CSR in and for the State of Texas, reported by machine shorthand, at the offices of Texaco, 1111 Bagby, Houston, Texas, pursuant to the Federal Rules of Civil Procedure and the provisions stated on the record or attached hereto. JOB NO. 01-48065

* * *

[44] Q. Now, one of the things that you – you mentioned that the synergy team looked at the possibility of cost savings resulting from the – from the alliance, right?

A. Uh-huh, yes.

Q. And that the cost savings were one of the [45] reasons for doing the alliance, right?

A. Uh-huh, yes.

Q. Are there any cost savings that you are aware of that are attributable to charging the same prices for the Shell and Texaco brands in the same pricing zones?

A. Not – not that I am aware of.

* * *

Schaub, Gayle M.

From: Shulman, Daniel R.
Sent: Wednesday, June 01, 2005 9:15 AM
To: Schaub, Gayle M.
Subject: FW: Shell/Texaco

----- Original Message -----

From: Adam.Hirsh@usdoj.gov
[mailto:Adam.Hirsh@usdoj.gov]
Sent: Tuesday, January 18, 2005 4:34 PM
To: Shulman, Daniel R.
Subject: RE: Shell/Texaco

Thanks, Dan. Yes, I will circulate to everyone here.

----- Original Message -----

From: Daniel.Shulman@gpmlaw.com
[mailto:Daniel.Shulman@gpmlaw.com]
Sent: Tuesday, January 18, 2005 4:41 PM
To: Hirsh, Adam
Subject: FW: Shell/Texaco

Here is the opposition we will be filing tomorrow to the motion of Visa, Coca Cola, and Microsoft to file an amicus brief in support of the petition in the Supreme Court. Apparently the case is of interest to the two biggest antitrust violators the Division has gone after in the recent past. I also enclose materials from the 9th Circuit record showing the testimony that price-fixing had nothing to do with the claimed efficiencies of the joint ventures, and that any cost savings were not passed on to consumers. I trust that you will distribute the enclosures to the appropriate people at the Division, including those who were at our meeting Friday, January 14.

----- Original Message -----

From: Schaub, Gayle M.
Sent: Tuesday, January 18, 2005 3:30 PM
To: Shulman, Daniel R.
Subject: Shell/Texaco

Opposition to Visa et al. motion to file amici curiae.pdf

Excerpts from Appellate Record.pdf

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MAY 26 2005
OFFICE OF THE CLERK

Nos. 04-805 and 04-814

In the Supreme Court of the United States

TEXACO, INC., PETITIONER

v.

FOUAD N. DAGHER, ET AL.

SHELL OIL COMPANY, PETITIONER

v.

FOUAD N. DAGHER, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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R. HEWITT PATE
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THOMAS G. HUNGAR
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(202) 514-2217

WILLIAM BLUMENTHAL
General Counsel
Federal Trade Commission
Washington, D.C. 20580

QUESTION PRESENTED

Whether an agreement between the owners of a lawful joint venture with respect to the pricing of the joint venture's products may be treated as a per se violation of Section 1 of the Sherman Act, 15 U.S.C. 1, when the joint venture's owners do not compete in the market for those products.

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7 Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* (2d ed. 2003) 11
Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 Yale L.J. 775 (1965) 14
DOJ & FTC, *Antitrust Guidelines for Collaborations Among Competitors* (Apr. 2000), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,161 (Apr. 12, 2000) (*available at* <www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>) 9, 16, 17, 18
DOJ & FTC, *Horizontal Merger Guidelines* (*reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104 (Apr. 2, 1992, rev. Apr. 8, 1997) (*available at* <http://www.usdoj.gov/atr/public/ guidelines/hmg.pdf>) 9
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In the Supreme Court of the United States

No. 04-805

TEXACO, INC., PETITIONER

v.

FOUAD N. DAGHER, ET AL.

No. 04-814

SHELL OIL COMPANY, PETITIONER

v.

FOUAD N. DAGHER, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the order of this Court inviting the Acting Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted, and the judgment below should be reversed.

STATEMENT

Petitioners Shell Oil Co. (Shell) and Texaco, Inc. (Texaco) formed two joint ventures to refine and market gasoline products within the United States. Respondents, a class of 23,000 gas station owners in the western United States, brought a suit alleging that Shell and Texaco violated the antitrust laws by agreeing that the joint venture operating within respondents' geographic region would unify the pricing of the Shell and Texaco brands of gasoline.

Respondents contended that the agreement constituted a per se violation of Section 1 of the Sherman Act, 15 U.S.C. 1. The district court rejected that theory of liability and granted summary judgment in favor of petitioners, but the court of appeals, in a divided decision, reversed. See Texaco Pet. 2-5; Shell Pet. 2-7; Pet. App. 1a-33a, 46a-69a.[1]

1. Petitioners were once "fierce competitors" in all aspects of the oil and gasoline markets. Pet. App. 3a. In 1998, however, they formed a "nationwide alliance" through two wholly-owned joint ventures that encompassed their "downstream" operations relating to the refining and sale of gasoline in the United States. *Id.* at 3a-4a. The two joint ventures, named Motiva Enterprises and Equilon Enterprises, each assumed responsibility for refining, transporting, and marketing Shell and Texaco gasoline products in distinct geographic regions. *Ibid.* Petitioners transferred all of their domestic downstream assets to those joint ventures and ceased competing separately in the downstream U.S. markets. *Id.* at 5a, 37a; Texaco Pet. 3; Shell Pet. 3-4.[2]

The dispute before this Court involves Equilon, which petitioners formed to own and operate their downstream assets in the western United States. Pet. App. 4a.[3] Petition-

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[1] "Texaco Pet." and "Shell Pet." refer, respectively, to the petitions for writ of certiorari in No. 04-805 and No. 04-814. "Pet. App." refers to the petition appendix in No. 04-805.

[2] The transfers of assets and personnel included "twelve refineries, twenty-three lubricant plants, two research laboratories, 22,000 branded service stations, over 24,000 miles of pipeline, 107 terminals, and approximately 24,000 employees." Pet. App. 4a n.3.

[3] Petitioners (together with a third joint-venture partner) formed Motiva to operate their downstream assets in the eastern United States. Pet. App. 3a-4a. The district court granted petitioners summary judgment on all claims related to Motiva because respondents had never purchased gasoline from Motiva. *Id.* at 34a-45a. The court of appeals affirmed on that point. *Id.* at 10a-12a.

ers' formation of Equilon was not subject to statutory reporting requirements, see 15 U.S.C. 18a, but the Federal Trade Commission (FTC) and four western state attorneys general investigated the transaction. Pet. App. 5a. The FTC issued a complaint alleging that the combination, as originally proposed, would harm competition in seven distinct markets. *In re Shell Oil Co.*, 125 F.T.C. 769, 769-777 (1998). The FTC and petitioners entered into a consent agreement that mandated divestiture of certain assets and related relief to prevent such harm, but did not impose any restrictions on pricing decisions respecting the joint venture's sale of Shell and Texaco products. See *id.* at 778-811.

Under the terms of the consummated joint venture, petitioners granted Equilon an exclusive license to sell gasoline under their brand names in the western United States, and they agreed to split Equilon's profits (or losses) in a fixed ratio based on the assets each contributed to the joint venture. Pet. App. 5a. Thus, each petitioner's returns were determined by Equilon's total profits and not by the relative sales of Shell-branded or Texaco-branded gasoline. The joint venture had an initial term of 20 years, but was terminable by mutual consent at any time, or unilaterally after five years (upon two years' notice). *Ibid.*[4]

At some point, "a decision was made" that Equilon would sell Shell-branded and Texaco-branded gasoline at the "same price in the same market areas," leaving to Equilon the determination of that price. Pet. App. 6a. Although the pricing of the two gasoline brands was unified, Texaco and Shell maintained each brand as a distinct product with "its own unique chemical composition (the gasoline

[4] The district court recognized that, in light of petitioners' extensive financial commitments and operational integration, the mere existence of such termination provisions did not call into question the joint venture's legality. Pet. App. 58a-60a.

is differentiated by separate packages of 'additives'), trademark, and marketing strategy." *Id.* at 6a-7a.

Petitioners continued to compete with each other in their domestic "upstream" operations (*e.g.*, exploring and producing crude oil), in their foreign operations, and in operations unrelated to refining and marketing gasoline (*e.g.*, their chemical, aviation fuels, and marine fuels businesses). See Pet. App. 5a, 56a. In addition, each company "retained its own trademarks and kept control over its own brands pursuant to separate Brand Management Protocols, each of which prohibited the joint ventures from giving preferential treatment to either brand." *Id.* at 5a; see *id.* at 58a.[5]

2. The district court granted petitioners summary judgment, holding in relevant part that respondents "have failed to raise a triable issue of material fact" on whether petitioners have engaged in per se unlawful "price fixing." Pet. App. 68a. The court noted that respondents had "eschewed an exhaustive rule of reason analysis" and instead asserted liability only "under the per se or quick look doctrines." *Ibid.*; see *id.* at 7a, 47a. The district court accordingly found no need to engage in a rule of reason inquiry in resolving the issues before it. See *id.* at 68a.

The district court rejected respondents' contentions that an agreement between Shell and Texaco to unify Equilon's pricing for Shell-branded and Texaco-branded gasoline in each local area would constitute per se unlawful

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[5] Shell has since bought out Texaco's interest in Equilon, in accordance with the conditions that the FTC imposed on the 2002 combination of Texaco and Chevron. See *In re Chevron Corp.*, No. C-4023 (FTC Jan. 2, 2002) (*available at* <www.ftc.gov/os/2002/01/chevronorder.pdf>). The FTC pointed out at that time that "[a]ll assets in each portion of the Alliance already are under common ownership and control, and divestiture of these interests to Shell * * * would closely maintain the situation that currently exists." FTC, *Analysis to Aid Public Comment*, 66 Fed. Reg. 48,136, 48,143 (Sept. 18, 2001).

horizontal price fixing in violation of Section 1 of the Sherman Act. Pet. App. 52a-54a. The court observed that "every * * * joint venture must, at some point, set prices for the products they sell." *Id.* at 53a. Respondents' theory, the court explained, would essentially "act as a per se rule against joint ventures between companies that produce competing products." *Id.* at 54a.

3. A divided panel of the Ninth Circuit reversed the district court's grant of summary judgment. Pet. App. 1a-33a. The court of appeals remanded for further proceedings to determine whether Shell and Texaco had committed a per se violation of the Sherman Act by agreeing that Equilon would charge identical prices for the two gasoline brands. *Id.* at 21a-23a, 27a-28a.

The court of appeals viewed the case as presenting the question whether the courts should "find an exception to the *per se* prohibition on price-fixing where two entities have established a joint venture that unifies their production and marketing functions, yet continue to sell their formerly competitive products as distinct brands." Pet. App. 12a-13a.[6] The court acknowledged that Equilon was a "legitimate," efficiency-enhancing joint venture. *Id.* at 4a-5a,

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[6] The court assumed that Shell and Texaco reached an agreement to unify prices at the formation of their alliance. See Pet. App. 13a ("the companies fixed the prices * * * by agreeing *ex ante* to charge the exact same price for each"); *id.* at 19a n.11 ("there is at least a triable issue of fact as to whether Texaco and Shell agreed in advance to charge the same price for their two distinct gasoline brands"). See also *id.* at 6a (the "decision to charge the same price for the two distinct brands 'was developed as sort of an operating requirement right from the very start or near to the very start of the alliance'"); *id.* at 22a (petitioners "*unified* the pricing of the two brands from the time the alliance was formed"). Neither the panel majority nor respondents have suggested that the agreement to unify prices—regardless of its timing—affected or applied to the prices of gasoline or other products sold by Texaco or Shell rather than by Equilon or Motiva.